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Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GERALD JONES AND

THELBERT STATEN,

PETITIONERS,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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36 pp

QUESTIONS PRESENTED

1. Should this Court exercise its supervisory power to overturn the district court's and Eleventh Circuit Court of Appeals' erroneous application of 18 U.S.C. §3006A, the Criminal Justice Act?

2. Should this Court exercise its supervisory power to resolve a split among the federal circuits: Whether the financial resources of a criminal defendant's family or friends, over which the defendant exercises no control, should be included in determining whether a criminal defendant is "indigent" for purposes of the Criminal Justice Act?

THE PARTIES

The caption in this case contains the name of all parties.

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18 U.S.C. §3006A ii,3,7,9,10,11,

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Fullan v. Commissioner of Corrections of the State of New York, 891 F.2d 1007 (2nd Cir. 1989). 14,16,17,

Griffin v. Illinois, 351 U.S. 12, 76 S.C 585, 100 L.Ed.2d 891 (1956) . . . . . .

Hanson v. Passer, 13 F.3d 275 (8th Cir. 1994) . . . . . .

Matthews v. Price, 83 F.3d 328 (10th Cir. 1996) . . . . . .

Roberts v. Lavallee, 389 U.S. 40, 88 S.C 194, 19 L.Ed.2d 41 (1967) . . . . . .

Russ v. Moffitt, 417 U.S. 600, 94 S.Ct. 24: 41 L.Ed.2d 341 (1974) . . . . . .

United States v. Martinez-Torres, 556 F.Sup 1275 (S.D.N.Y. 1983) . . . . . .

United States v. Robinson, 718 F.Supp. 1582 (M.D.Ga. 1989) 10,15

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PETITION FOR WRIT OF CERTIORARI
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REFERENCE TO OPINIONS DELIVERED BELOW

1. Petitioner respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals

for the 11th Circuit in this case.

Opinions Below

1. The order of the Eleventh Circuit (98-6008) denying Appellants' motion for a free trial transcript on direct criminal appeal can be found as (Appendix A).

2. The order of the United States District Court for the Southern District of Alabama, requiring the Appellants' appellate counsel to pay a pro rata share of the transcript costs can be found as (Appendix B).

3. The order of the United States District Court for the Southern District of Alabama, requiring Petitioner's counsel to disclose her fee arrangements with Petitioner's family can be found as (Appendix C).

STATEMENT OF JURISDICTION

The Court of Appeals denied Appellants' motion for a free trial transcript on July 14, 1999. (See Appendix A) The order of the United States District Court was entered on February 12, 1999. (See Appendix B)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

Appellants Gerald Jones (hereinafter "Jones")and Thelbert Staten (hereinafter "Staten")were indicted in June 1997 and charged with counts of conspiracy to distribute controlled substances in violation of 21 U.S.C. §846. Pretrial, Jones and Staten were granted indigent status pursuant to 18

U.S.C. §3006A and 28 U.S.C. §1915.

Jones and Staten were convicted on September 9, 1997 in the United States District Court for the Southern District of Alabama, Mobile Division, the Hon. Richard Butler presiding. Case Nos. CR-97-99-01, CR-97-99-22. Jones and Staten filed timely notices of appeal.

On February 12, 1999, the United States District Court entered an order which found that Jones' family had paid $7,500 towards Jones' appellate fee, and that Staten's family had paid $2,500[1] towards Staten's appellate fees. The Court ordered Jones and Staten's appellate counsel to pay $1,320.00 to that Court's Criminal Justice Act fund, said amount

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[1] Both Petitioner's families have since paid the entire $7,500 (each) legal fee.

being Jones and Staten's pro rata share of the cost of the trial transcript.

Jones and Staten appealed this order in a motion to the Eleventh Circuit Court of Appeals dated on or about February 26, 1999. The Eleventh Circuit denied the motion in an order dated July 14, 1999.

Reasons for Granting the Writ

The district court and Eleventh Circuit Court of Appeals have ordered the retained attorney for appellants Jones and Staten pay the pro rata share of Jones' and Staten's trial transcripts. This order has wide-reaching implications for criminal defendants. If this erroneous ruling is allowed to stand, not only will it violate the right of criminal defendants to effective assistance of counsel and access to courts as guaranteed by the U.S. Constitution, it will constitute an unlawful

taking of private property. It will have a chilling effect on the criminal defense bar, as attorneys will be discouraged from representing defendants previously determined to be indigent pursuant to the Criminal Justice Act, for fear that federal courts will attempt to force the attorneys to pay their clients' costs at the trial and appellate levels.

Jones and Staten were declared indigent and provided with court-appointed counsel at their trial. Following conviction, the families of Jones and Staten sought to employ the undersigned counsel to represent Jones and Staten in an appeal to the Eleventh Circuit Court of Appeals. Jones' family paid $7,500. Staten's family ultimately paid $7,500.

Jones and Staten contend that the district court erred in ordering Jones and

Staten's appellate counsel to personally pay $1,320.00 to that court's Criminal Justice Act fund for Jones' and Staten's pro rata share of the transcript costs.

First, the district court has no authority under the Criminal Justice Act to require the defendant's counsel to pay any costs. In so doing, the district court violated Jones and Staten's due process and equal protection rights under the U.S. Constitution, misinterpreted statutory federal law and abused its discretion.

Second, the circuits are split regarding whether the funds belonging to a defendant's family or friends, over which the defendant has no control, should be included in determining indigency status. The Eleventh Circuit holds that such funds may be included in making an indigency determination, while

the Second and Tenth Circuits hold that they may not.

ARGUMENT

1. Should this Court exercise its supervisory power to overturn the district court's and Eleventh Circuit Court of Appeals' erroneous application of 18 U.S.C. §3006A, the Criminal Justice Act?

Jones and Staten first contend that the order of the district court, and its subsequent affirmance by the Eleventh Circuit Court of Appeals, constitutes a clear abuse of discretion, as it orders Jones' and Staten's counsel to reimburse monies into the Court's Criminal Justice Act fund - which is not permitted by the plain language of the statute itself.

A. Standard of Review.

The decision whether to grant a request to proceed in forma pauperis is committed to the sound discretion of the trial court. Williams v. Estelle, 681 F.2d 946 (5th Cir. 1982); United States v. Robinson, 718 F.Supp. 1582 (M.D.Ga. 1989).

B. Statutory Authority.

18 U.S.C. §3006A(f) states in pertinent part that:

> Whenever the United States magistrate or the court finds that funds are available for payment from or on behalf of a person furnished representation, it may authorize or direct that such funds be paid to the appointed attorney, to the bar association or legal aid agency or community defender organization which provided the appointed attorney, to any person or organization authorized pursuant to subsection (e) to render investigative, expert, or other services, or to the court for deposit in the Treasury as a reimbursement to the appropriation,

> current at the time of payment, to carry out the provisions of this section.

The district court's order thereby violates 18 U.S.C. §3006A(f) in that the statute's plain language does not allow the district court to order that the retained appellate attorney surrender all or part of his legal fee to pay transcripts. The district court's authority is limited to ordering the defendant to pay such costs.

In the instant case, both Jones and Staten were granted indigent status by the district court; however, after Jones' and Staten's families attempted to retain an appellate counsel, the district court ordered their appellate counsel to pay $1,320.00 to the Court's Criminal Justice Act fund. This amount constituted approximately 2/7 of the

total transcript costs (there were seven codefendants at the criminal trial).

In so doing, the district court acted outside the authority granted in 18 U.S.C. §3006A(f), and so abused its discretion. It is undisputed that when court-appointed counsel is provided, it is constitutionally permissible to require the defendant to repay the expenses incurred by the State in providing representation if the defendant later becomes able to pay. Hanson v. Passer, 13 F.3d 275, 279 (8th Cir. 1994) (emphasis added). Likewise, at or following an indigency determination, the judicial officer may inquire into the financial condition of a defendant's spouse, and if such spouse indicates that he or she is willing to pay part or all of the counsel's costs, the judicial officer may direct deposit or

reimbursement. 7 Administrative Office of the United States Courts, *Guide to Judiciary Policy and Procedures*, Appointment of Counsel in Criminal Cases, §2.06, cited in United States v. Salemme, 985 F.Supp. 197, 201 (D. Mass.1997). See also 18 U.S.C. §3006A(c),(f).

Clearly, the district court may order the defendant to reimburse all or part of the money expended by the Government pursuant to the Criminal Justice Act. However, the district court may not order the defendant's attorney to reimburse part or all of the monies expended by the Government pursuant to the Criminal Justice Act. The district court's order was outside its authority and repugnant to the purpose and intent of the Criminal Justice Act.

C. Due Process and Equal Protection

Jones and Staten's federal due process

and equal protection rights were violated by the district court's order.

As a general matter, differences in access to the instruments needed to vindicate legal rights, when based upon the financial situation of the defendant, are repugnant to the Constitution. Roberts v. Lavallee, 389 U.S. 40, 42, 88 S.Ct. 194, 195-96, 19 L.Ed.2d 41 (1967); Russ v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed.2d 341 (1974). When the applicable statutes provide a right to appeal a criminal conviction, an indigent defendant is entitled to "as adequate appellate review as defendants who have money enough to buy the transcripts." Griffin v. Illinois, 351 U.S. 12, 19, 76 S.Ct. 585, 591, 100 L.Ed.2d 891 (1956).

The district court's order that Jones and Staten, alone among the seven co-defendants,

were denied free transcripts because their families paid for retained counsel on appeal violated Jones' and Staten's rights to due process and equal protection. See, e.g., Fullan v. Commissioner of Corrections of the State of New York, 891 F.2d 1007, 1011 (2nd Cir. 1989).

2. Should this Court exercise its supervisory power to resolve a split among the federal circuits: Whether the financial resources of a criminal defendant's family or friends, over which the defendant exercises no control, should be included in determining whether a criminal defendant is "indigent" for purposes of the Criminal Justice Act?

Additionally, Jones and Staten contend that there exists a split among the circuits

with regard to whether the district court is entitled to include the assets of a defendant's family or friends, over which the defendant has no control, in determining whether a defendant is entitled to be granted in forma pauper status under the Criminal Justice Act.

The district court's order in this case (Exhibit B) clearly takes such assets into account. This view was ratified by the Eleventh Circuit Court of Appeals in affirming the district court's order. See also United States v. Robinson, supra at 1583: "In determining whether a defendant is entitled to court-appointed counsel the relevant threshold inquiry is whether defendant is financially unable to obtain adequate representation, and financial inability includes an inquiry into whether there is available to defendant funds

from other sources such as family, friends, trusts, estates, or defense funds." (citing United States v. Martinez-Torres, 556 F.Supp. 1275 (S.D.N.Y. 1983).

By contrast, the Second Circuit follows the opposite holding. In Fullan v. Commissioner of Corrections of the State of New York, 891 F.2d 1007, 1011 (2nd Cir. 1989), supra, the Second Circuit addressed this precise issue: "But in the state of facts assumed here, respondents focus not on assets owned or controlled by the defendant but rather on assets belonging to his family and friends. This focus is inappropriate, for indigence is personal. The State is not entitled to treat the funds of others, over which a defendant has no control, as assets of the defendant."

The Fullan Court added, "The

determinative consideration is that a state has no right to dictate how the defendants' family and friends will spend their money. Insofar as the State's prosecution of a defendant is concerned, family and friends are bystanders." Id., 891 F.2d at 1011.

The Tenth Circuit apparently is in line with the Second's Circuit's holding in Fullan. "We initially note that simply because a criminal defendant has been provided with a lawyer and posted bail due to the beneficence of his family does not, ipso fact, mean that he loses his status as an indigent." Matthews v. Price, 83 F.3d 328 (10th Cir. 1996).

In Jones and Staten's case the district court merely inquired how much the retained appellate counsel had been paid. Upon learning that Jones' and Staten's appellate counsel had been partially paid the appellate

legal fee, the district court ex mero motu ordered the appellate counsel to pay Jones' and Staten's pro rate share of the transcript. The district court failed to inquire further; specifically, the district court failed to determine whether Jones and Staten owned or controlled the funds provided by their families to their appellate counsel. The district court clearly abused its discretion in so doing. This Court should resolve the split between the circuits and adopt the bright-line rule found in Fullan, supra.

CONCLUSION

WHEREFORE, for the above-cited arguments and citations to authority, Petitioners pray that this Court will grant their Petition for Certiorari, hear the case on its merits, and grant the relief sought.

Respectfully submitted,

/s/_____
SUSAN G. JAMES
Counsel of Record

Susan G. James & Associates
600 South McDonough Street
Montgomery, Alabama 36104
(334) 269-3330

Counsel for Petitioners

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6008-I

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHRIS LIPSCOMB,
WILMER KEITH BRECKENRIDGE, a.k.a. Sonny,
ET AL.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Alabama

BEFORE: TJOFLAT, BIRCH and CARNES, Circuit Judges.

BY THE COURT:

Appellants Jones and Straten's motion for transcripts at government expense is DENIED.

Appellants Jones and Straten's motions to file their motion for transcripts at Government expense is GRANTED.

Attorney W. Gregory Hughes' motion to withdraw as counsel for Appellant Breckenridge is DENIED WITHOUT PREJUDICE TO RENEWAL should additional counsel enter an appearance on behalf of this Appellant.

United States Court of Appeals
Eleventh Circuit
56 Forsyth St., NW
Atlanta, GA 30303

In Replying Give Number
Of Case And Names of Parties

July 14, 1999

Susan Graham James
Susan G. James & Associates
600 South McDonough Street
Montgomery, AL 36104

RE: 98-6008-I USA v. Lipscomb

Pursuant to Eleventh Circuit Rule 42-1(b) you are hereby notified that upon expiration of fourteen (14) days from this date, **this appeal will be dismissed by the clerk without further notice** unless the default(s) noted below have been corrected:

Complete the transcript order form (Appeal Information Sheet) and order the transcript, as required by Fed.R.App.P. 10(b)(1); an Appeal Information Sheet is available from the district court clerk. APPELLANT IS REQUIRED TO SERVE A COPY OF PAGE 1 OF THE APPEAL INFORMATION SHEET ON ALL PARTIES AND THE CLERK OF THIS COURT AND OF THE DISTRICT COURT WHEN IT IS DELIVERED TO THE COURT REPORTER.

Make satisfactory financial arrangements for transcript preparation with the court reporter as required by Fed.R.App.P. 10(b)(4).

11th Cir. R. 46-1(d)(1) provides that "Retained counsel for a criminal defendant has an obligation to continue to represent that defendant until successor either enters an appearance or is appointed under the Criminal Justice Act, and may not abandon or cease representation of a defendant except upon order of the court."

11th Cir. R. 42-1(b) also provides that "If an appellant is represented by appointed counsel, the clerk may refer the matter to the court for possible disciplinary action against counsel in lieu of dismissal."

Sincerely,

THOMAS K. KAHN, Clerk

Reply to: Michelle Shannon (404)335-6188

(nh)

This notice applies to appellant's Jones and Straten.

c: District Court Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA)

v.) CRIMINAL ACTION
NOS. 97-00099-01
97-00099-22

GERALD JONES and)
THELBERT STATEN

UNDER SEAL

Defendants.)

ORDER

Pursuant to the Court's order dated November 5, 1998, counsel for the defendant has updated information regarding attorney's fees received. Counsel states that the family of defendant Gerald Jones has paid counsel's entire $7,500 fee for representing defendant Jones on appeal and that the family of Thelbert Staten has paid $2,500 of counsel's $7,500 fee. Based on this information, the Court finds that counsel should reimburse this Court's CJA fund for a proportionate share of the cost of the

transcript. Accordingly, within thirty days of the date of this order counsel shall pay into the registry of the Court one thousand three hundred twenty and no/100ths ($1,320.00) dollars.[2] The Clerk of the Court shall apply the amount paid into Court into the CJA fund.

It is so **ORDERED**.

DONE this the 12 day of February, 1999.

/s/_____

CHIEF DISTRICT JUDGE

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[2] According to Court records, the cost of the transcript was $4,626.00 dollars. When the cost is divided among seven defendants, each defendants proportionate share is approximately $600.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA

UNITED STATES OF AMERICA	)	
v.	)	CRIMINAL ACTION NO. 97-00099-34
THELBERT STATEN,	)	
Defendants.	)	

ORDER

This matter is before the Court on defendant's motion for a free transcript (Doc. 1332). Defendant, who proceeded *in forma pauperis*, at trial is now represented by retained counsel. According to the motion, counsel was retained by defendant's family, the family indicates that they have no funds with which to purchase the transcript and the defendant remains indigent. In order for the Court to determine whether there are sufficient funds available to pay for the transcript, it is necessary for counsel to submit, in camera, a statement of the amount she has been, or expects to be, paid by defendant's family for her services at

sentencing and on appeal and the estimated cost of the transcript. Counsel's submissions should be filed no later than August 14, 1998.

It is so **ORDERED**.

DONE this the 20th day of July, 1998.

/s/_____

CHIEF DISTRICT JUDGE